

Analyses of samples of the articles by the Bureau of Chemistry of this department showed that the pills contained iron sulphate, aloes, and extract of plant drugs, coated with sugar and calcium carbonate, colored pink.

It was alleged in substance in the libel that the articles were misbranded in that the following statements regarding the curative and therapeutic effects of the said articles, (box) "Emmenagogue Pills recommended for Amenorrhea, Dysmenorrhea and other Menstrual Troubles. * * * beginning treatment * * * before the regular monthly period. * * * continue * * * until relief is obtained," were false and fraudulent for the reason that the articles contained no ingredient or combination of ingredients capable of producing the effects claimed.

On February 3, 1923, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the products be destroyed by the United States marshal.

HOWARD M. GORE, *Acting Secretary of Agriculture.*

11784. Misbranding of Crab Orchard concentrated mineral water. U. S. v. 22 Bottles of Crab Orchard Concentrated Mineral Water. Tried to the court and a jury. Verdict for the Government. Judgment of condemnation and forfeiture. Product released under bond to be relabeled. Case pending on appeal in U. S. Circuit Court of Appeals. (F. & D. No. 15395. I. S. No. 903-t. S. No. C-3245.)

On September 22, 1921, the United States attorney for the Southern District of Ohio, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel, and on October 7, 1921, an amended libel, praying the seizure and condemnation of 22 bottles of Crab Orchard concentrated mineral water at Cincinnati, Ohio, consigned by L. H. Goodwin & Co., Crab Orchard, Ky., September 6, 1921, alleging that the article had been shipped from Crab Orchard, Ky., and transported from the State of Kentucky into the State of Ohio, and charging misbranding in violation of the Food and Drugs Act, as amended. The article was labeled in part: (Bottle) "Beneficial in the Treatment of * * * Rheumatism, Piles, Indigestion, Dyspepsia, Dysentery * * * Headaches, and other Ailments arising from Diseases of the Stomach, Kidneys, Liver and Impure Blood. It is a Remedy * * * to cure or relieve * * * afflicted [of] humanity. * * * possesses the necessary elements for the speedy and permanent restoration to perfect health. It strengthens every fibre of the human system and imparts to the nerves a new force of determined energy. Even the aged find in its [their] healing powers a most reliable remedy for the restoration of failing vitality. * * * At the appearance of indisposition, it proves a most reliable remedy. * * * It is in every way a *health preserver* as well as a *healer*. Where habitually used the physician is a stranger * * *. For the Liver, Kidneys, Rheumatism * * * Dysentery.—One teaspoonful * * * until relieved * * * never should the remedy be entirely discontinued until complete health is restored. * * * It quickly destroys the germs of disease and removes the causes of ailments by purifying the blood and cleansing the entire system of uric acid poisoning and poisonous germs;" (carton) "Beneficial In Treating * * * Rheumatism Lumbago Loss Of Appetite * * * Headache Vertigo Sleeplessness * * * Bilious Colic Indigestion Dyspepsia Piles Kidney Disease Bladder Trouble Liver Complaint Jaundice Dysentery Catarrh Eczema And All Other Diseases Arising From A Disordered Stomach, Liver * * * And Impure Blood. * * * Tonic And * * * System Regulator."

Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results:

Salts (by combining the radicals).	Grains per quart.
Epsom salt ($\text{MgSO}_4 \cdot 7\text{H}_2\text{O}$).....	5,516.74
Glauber's salt ($\text{Na}_2\text{SO}_4 \cdot 10\text{H}_2\text{O}$).....	1,434.81
Common salt (NaCl).....	32.99
Dolomitic limestone (CaCO_3 and MgCO_3).....	21.53
Total.....	7,006.07

It was alleged in substance in the libel that the article was misbranded in that the labeling bore the above-quoted statements, regarding the curative or therapeutic effect of the said article, which were false and fraudulent in that the article contained no ingredient or combination of ingredients capable of producing the effects claimed, and in that it was insufficient of itself for the successful treatment and cure of the ailments and diseases for which it was prescribed and recommended in the said statements.

On November 28, 1922, the case came on for trial before the court and a jury. After the submission of evidence and arguments by counsel the court delivered the following charge to the jury (Peck, *D. J.*):

"Gentlemen of the jury, it is now my duty in this, as it is in other cases, to charge you with regard to the law which will govern your deliberations; that is to say, charge you with regard to the law in the case. You are the sole judges of the facts; it is entirely within your province to say what the facts are. It is the duty of the court to declare the law to you, and it is your duty to accept the law as the court declares it and to apply it to the facts as you find them to be, and so reach your verdict and say whether you find that this product is misbranded or is not misbranded; for that is the issue in this case. I say, the issue is whether or not the product is misbranded. The branding consists of all the statements made upon the label and upon the outside of the carton or box in which the bottles are enclosed.

"The Government states its case in a paper called a libel, and the libel of the Government charges that this product is misbranded in the following statements: [The court here quoted the foregoing labeling].

"Those are the statements which the Government claims constitute the misbranding of this product.

"The defendant, or rather, we call the opposite party here the claimant, answers and denies that this product is misbranded. The burden of proof is upon the Government of the United States to prove by a preponderance of evidence which is clear and convincing that this product is misbranded before you can find it misbranded.

"In order to prove it misbranded it must be shown that the statements charged as misbranding in the libel, which I have just read to you, are in whole or in some substantial part false and fraudulent. By 'false' is meant not true. The term, I think, needs no definition. That which does not square with the truth is false. 'Fraudulent' means with deception deliberately practiced with a view of gaining an unfair advantage. If one knowingly makes a false statement for the purpose of gaining an unfair advantage, as an unfair advantage over purchasers—those of the public who may purchase—such false statement is also fraudulent. If one makes a false statement recklessly, that is to say, in reckless disregard of the truth, without taking steps to ascertain whether that which is claimed is true or false, and if the natural effect and consequence will be, if the statement turns out to be false, to take advantage or gain an advantage of the purchaser, then that statement would be a fraudulent statement. If one innocently believing in the truth of what is stated makes a statement concerning that which is contained in the package—not intending to deceive anybody, in good faith and believing in the truth of that which is stated—it can not be a fraudulent statement even though it turns out to be false in fact. In other words, gentlemen, it comes to this: Was there a false statement made in bad faith or was there not? If false, but made in good faith, the product could not be considered misbranded; if true, the product could not be considered misbranded; but if false and made in bad faith, fraudulently, then the product would be misbranded.

"Now I have said this applies to the statements made on the label and on the exterior of the carton, so far as they are set forth in the Government's pleading called the libel, in whole or in part. In other words, if any substantial part of these statements are false and fraudulent or, I should say, if any substantial part of these statements is false and fraudulent, the fact that the remainder may be innocent would not save the package from being misbranded. It is the purpose of the Pure Food and Drugs Act to promote honest dealing between those who sell and those who buy, through the medium of interstate commerce, articles of this kind. It is admitted that these articles were articles that passed through interstate commerce. It is just as though the seller stood face to face with the buyer and said, 'I sell you this package. This package contains thus and so. Its qualities are thus and so.' These statements are to be treated as though they were made by word of mouth between

two people, the purchaser relying and having the right to rely upon what the seller said to him. It is the purpose of the Pure Food and Drugs Act to insist that people deal without fraud in making such statements.

"Now the words upon this label and on this carton—I have stated during the course of the trial to you and now briefly repeat—are to be taken in their ordinary sense, as an ordinary purchaser of reasonable intelligence would take them. In judging whether these statements were fraudulent, you may take into consideration all of the surrounding circumstances—everything that had come to the attention and notice of the person who made these statements and put them upon this carton. You may take into consideration the fact, if it be a fact, that under some circumstances and at some times this water had been ordered by a physician to be sold to certain persons; but of course you can only give that such effect as it is reasonably entitled to receive. Having considered all of the surrounding circumstances, you will say to yourselves: Was the maker of this label and this carton justified, that is to say, was the one who put out this product justified in fact in putting these statements on it and putting this product before the public with these statements on it? Was that or was it not an honest act?

"You are the sole judges of the credibility of the witnesses, that is to say, the extent to which you will believe the witnesses who have testified before you, and it is your duty to reconcile the conflicting testimony of various witnesses and conflicting statements so far as it may reasonably be done.

"Witnesses, those who are supposed to know more than the ordinary person about such subjects, such as chemists and physicians, have been permitted to give their opinions as to various matters. Opinion evidence is not binding upon you, but should be considered in connection with all the other evidence in the case. Should you believe it, you may accept and follow it. By an opinion I mean a statement or a conclusion arrived at by the witness from experience or from knowledge, as distinguished from testimony concerning a direct fact. If I were to say, 'That is a stone house across the street that I see,' that would be a statement of fact; but were I to say that 'My belief is that that house is worth two hundred thousand dollars,' that would be merely an opinion as to its value.

"Now you are the sole judges of the value of opinion evidence. Of course, an opinion is worthless unless it is the honest opinion of the man who states it. If it is his honest opinion, then its value depends upon how much he knows about the subject concerning which he is testifying. If he is thoroughly experienced, thoroughly grounded in his subject, if his opinion is the result of mature reflection, if he is a man of strong logical intellect, his opinion would be entitled to great value. If, on the other hand, he was incapable of logical thinking, or if he was not well grounded in his subject, not familiar with the facts upon which his conclusion is assumed to be based, then of course his opinion would be of little or no value; and it is for you to decide what value you will give to the opinion evidence that you have heard.

"Now a great deal of the evidence of the witnesses who have testified concerning their own ailments is in the nature of opinion evidence. Those witnesses who testified that they had well-known, easily discernible diseases, or easily told diseases—I will say, such as headache or constipation, or something of that sort—of course there would be very little reason to doubt that they knew what they had. But if one testified that he thought that he had some more obscure disease, more difficult to diagnose, and his diagnosis of what he had depended entirely upon his own opinion and he was unable to make such a diagnosis, his opinion would be of very little value. Those are matters for you to take into consideration in weighing the testimony of the witnesses.

"You may also consider the interest of the witnesses, if they have any, in the outcome of the case—their affiliation with either of the parties, their manner of testifying, their appearance upon the witness stand, whether their testimony was logical or otherwise—these and any or all other subjects touching the credibility of the various witnesses you may take into consideration; and having considered all matters, you will give to the testimony of each and every witness such weight as you find it entitled to receive. That is your province.

"And now, gentlemen, if upon a consideration of all the evidence you find that the statements charged in the libel are false and fraudulent in any substantial part, you will find the product to be misbranded. If, on the other hand, you do not find that the statements charged in the libel are false and fraudulent in some substantial particular, then you will find the product to be not misbranded."

The jury then retired and after due deliberation returned a verdict for the Government. On December 1, 1922, the claimant filed a motion for a new trial which motion was overruled, to which ruling the claimant excepted. On December 30, 1922, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be relabeled and sold by the United States marshal, with the proviso in said judgment that the product might be released to the claimant, Idie C. Goodwin, for and on behalf of L. H. Goodwin & Co., upon payment of the costs of the proceedings and the execution of a bond in the sum of \$100, in conformity with section 10 of the act, conditioned in part that the product be relabeled in a manner satisfactory to this department. On January 13, 1923, the claimant having theretofore filed a motion that the verdict of the jury be set aside and judgment entered for the claimant, and said motion having been overruled and exception to said ruling having been duly taken by the claimant, the above judgment was corrected to incorporate said motion, ruling, and exception. The claimant having perfected an appeal, the case is now pending on appeal in the United States Circuit Court of Appeals for the Sixth Circuit.

HOWARD M. GOBE, *Acting Secretary of Agriculture.*

11785. Adulteration of canned cherries. U. S. v. 400 Cases of Cherries. Decree of condemnation and forfeiture. Product released under bond. (F. & D. No. 16862. I. S. No. 8855-v. S. No. C-3809.)

On or about September 30, 1922, the United States attorney for the Northern District of Ohio, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel, and on December 7, 1922, an amended libel, praying the seizure and condemnation of 400 cases of cherries, remaining in the original unbroken cases at Akron, Ohio, alleging that the article had been shipped by the Francis H. Haserot Co., Traverse City, Mich., on or about August 14, 1922, and transported from the State of Michigan into the State of Ohio, and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Mission Brand Pitted Cherries Francis H. Haserot Co. Packers Factory - Haserot Pier Grand Traverse Bay, Mich. The Haserot Company Distributors Cleveland, Ohio."

Adulteration of the article was alleged in the libel for the reason that it consisted wholly or in part of a filthy, decomposed, and putrid vegetable substance.

On March 23, 1923, the Francis H. Haserot Co. having appeared as claimant for the property and having admitted the allegations of the libel, judgment of condemnation was entered, and it was ordered by the court that the product might be released to the said claimant upon payment of the costs of the proceedings and the execution of a bond in the sum of \$1,000, conditioned in part that it be not disposed of in violation of law.

HOWARD M. GOBE, *Acting Secretary of Agriculture.*

11786. Adulteration and misbranding of vinegar. U. S. v. 129 Cartons of Apple Cider Vinegar. Decree ordering release of product under bond to be relabeled. (F. & D. No. 16919. I. S. No. 9208-v. S. No. C-2934.)

On November 13, 1922, the United States attorney for the Northern District of Ohio, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel praying the seizure and condemnation of 129 cartons of apple cider vinegar at Cleveland, Ohio, alleging that the article had been shipped by the Powell Corp., from Canandaigua, N. Y., on or about September 7, 1922, and transported from the State of New York into the State of Ohio, and charging adulteration and misbranding in violation of the Food and Drugs Act. The article was labeled in part: "Tri W Brand * * * 16 Oz. * * * Reduced With Water To 4% Acetic Strength Pure Apple Cider Vinegar."

Adulteration of the article was alleged in the libel for the reason that distilled vinegar had been mixed and packed with and substituted wholly or in part for the said article.

Misbranding was alleged for the reason that the statement, "Pure Apple Cider Vinegar," was false and misleading and deceived and misled the purchaser. Misbranding was alleged for the further reason that the article was an imitation of and offered for sale under the distinctive name of another article.